THE

RESPONSIBILITY OF THE INSANE

FOR THEIR CRIMINAL ACTS.

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THE RESPONSIBILITY OF THE INSANE FOR THEIR CRIMINAL ACTS.

How far insanity should be received in excuse for crime, is a question on which, as we all know, there still exists much diversity of opinion. Notwithstanding that the study of metaphysics has, of late years, engaged the attention of some of the profoundest thinkers of the time; notwithstanding that better opportunities for the study of insanity have been afforded by the modern practice of gathering its subjects into large receptacles for care and custody; and notwithstanding that cases for legal adjudication in the courts of justice have been increasing with remarkable rapidity, we are yet, apparently, as far as ever from well-settled conclusions respecting the exculpatory effects of mental disease. Among lawyers and among physicians; among men of science and culture as well as among men who pretend to neither; among men of extreme conservatism as well as among those who are never satisfied with the present—in each and all of these classes, we find, on this subject, most diverse and even opposite views. This we may be inclined to regard as unwarrantable under the circumstances, proceeding as it does from neglect or careless use of the information at our disposal, yet, considering the part which passion, prejudice, and illogical reasoning, have in the formation of all opinions, it is neither strange nor extraordinary.

In the history of English jurisprudence, insanity, as an excuse for crime, scarcely made its appearance until within a comparatively recent period. Towards the middle of the seventeenth century, it may have been recognized as such in some of its grosser forms. With that better understanding of mental phenomena, and that milder treatment of human infirmity, which began to be visible in the literature and science of a somewhat later period, insanity became an unquestionable element both of moral and of legal irresponsibility. Lord Hale undertook to define, with some show of precision, the exact extent of its influence upon the mental movements, and consequently of its effect in impairing the responsibility of its subjects. In this attempt he was guided, unquestionably, by the best medical opinions of his time, as he found them in books, and in the discourse of eminent members of the medical profession. As the result of his inquiries, he came to the conclusion that insanity in its milder forms was not necessarily incompatible with responsibility for crime, while he freely admitted that in its severest manifestations it was an ample excuse for any criminal acts that might be committed under its influence. And ever since, his successors on the English bench have been seeking for some tests whereby these two grades of the disease might be distinguished, the one from the other, but always with very indifferent success; although, moved by that spirit of humanity which has been steadily infusing itself into the English law, their instructions in par-

ticular cases have become more and more frequently correct. The tests which have been promulgated from time to time, not being founded on any correct knowledge of insanity, have each and all proved unsatisfactory when scrutinized under the light of practical observation; but, notwithstanding, they are still put forth occasionally as the law of the land. The discredit into which they have fallen, has somewhat, but not in a corresponding degree, widened the application of the plea of insanity in criminal cases, while it seems also to have given rise to some extent to the very opposite condition, the now prevalent distrust of the plea being supported by reasons which, though far from being new, have recently become endowed with a significance quite unwarranted by what we know of mental operations under the influence of disease. They are no less satisfactory, however, to that large class of people who having taken their opinions from one another, with but little knowledge of the subject itself, find it convenient to allege some plausible grounds for their belief.

In the light derived from a good deal of intimate intercourse with the insane, and from the study of various authors who have written on the subject, I propose to examine the reasons now most often given for withdrawing that exemption from punishment which, in a greater or less degree, the insane have hitherto experienced. I am not so sanguine as to suppose that any efforts of this kind will turn the current of opinion now setting against these unfortunate victims of disease, but the solitary inquirer, sincerely seeking for the truth, should not be obliged to seek in vain.

Much, if not most, of the present feeling on this subject may be traced to the legal profession, by which the plea of insanity has never been very cordially received. To lawyers, it seems like an intrusive element having no proper place in our legal system, but which, nevertheless, cannot be kept out of it. It implies, as we all know, a scientific fact to be examined, and its significance determined, by the rules and in the spirit of modern scientific investigation. This is a task completely outside of the domain of law. The lawyer has had no scientific training, and his knowledge of physical, and especially of medical, science, is only that which floats on the surface of the current thought. The more that is learned about insanity, the more difficult does he find it, for lack of such training, to determine its exact relations to crime. Even when told that the insane, generally, know right from wrong, what is lawful and what is unlawful, and recognize the distinction between vice and virtue, he is still unable to see what element of crime is wanting in their criminal acts. He looks at them, not from the scientific, but from the legal, or, more properly speaking, the metaphysical, point of view.

When a person commits a criminal act, knowing that crime is wrong and forbidden by the laws of God and man, incited to it, perhaps, by a rational motive—to gratify some passion, or to avenge some injury—evincing design and contrivance in the execution of it, the lawyer is constrained to believe, as a strictly logical sequence, that such a person should be punished. In such an act, not a single ingredient of crime, as he has studied his books, is wanting. A person, he says, who imagines that another, sitting opposite to him at table, is making faces at him, is led to this belief by some morbid condition of the perceptive organs, for which he is not to blame, certainly, but which furnishes no excuse for shooting his imaginary foe, because he knows as well as he ever did that killing or maiming another is wrong and unlawful. Besides, he acted deliberately, he had malice in his heart, and, as the old indictments used

to have it, he was moved by the evil instigation of the devil. What then was wanting to render him responsible? Nothing, certainly, if we leave out of the account those springs of action, no less real and potent, which are introduced into the mental mechanism by disease, and ignore entirely some faculties of the mind, as necessary for determining and regulating the conduct as those which are recognized. He can find no excuse in his philosophy for one who slays the dearest objects of his affection, while admitting the wrong and deploring the necessity which obliges him to do it, simply because he has but a faint apprehension of the mental faculties chiefly concerned in the act, and scarcely any apprehension at all of how they are affected by disease. In short, of the two classes of faculties or manifestations that make up the mind, one, considered as the subject of disease, is altogether ignored, while the operation of the other under stress of disease is greatly misunderstood.

And thus it is that in their theories respecting the responsibility of the insane, the lawyers, in their imperfect understanding of the nature and operations of the mind, commit two serious mistakes; one is that, where the mental affection is too obvious to be overlooked, they measure and define the scope of its influence in an arbitrary manner, unsupported entirely by the facts of psychological science; while the other, as just intimated, consists in regarding the affectional faculties—the sentiments, emotions, and passions—as without any part in the play of disease, or with so little that it may be safely ignored. The first mistake may be witnessed in the rule propounded many years ago by Hoffbauer, a German jurist of great repute, that an insane person may be excused for any act prompted by a delusion, only as far as the act would have been excusable had the belief been a reality instead of a delusion. That is to say, if an insane person imagined that another was approaching him with intent to take his life, he might kill him, and be excused on the plea of insanity; but if he only imagined that this person was making faces at him, or had been following him from one place to another, he should not be so excused, because had the offence been real instead of imaginary, it would not have justified the killing. Never has there occurred a more remarkable instance of this mistake than that presented by the English law-lords, in 1843, on the occasion of the trial of McNaughton, for killing the secretary of Sir Robert Peel. McNaughton was possessed by the delusion that he was pursued by enemies who, though unknown and unseen, completely destroyed his peace. In fact, he was laboring under what is now called the *mania of persecution*. He had somehow connected Sir Robert Peel with this conspiracy, and concluded to shoot him; but mistook his secretary for him, and killed the latter instead of the prime minister. He was acquitted on the ground of insanity, but the public rebelled so strongly against the verdict that the matter was brought before Parliament, which instructed the law-judges, twelve in number, to confer together and decide what the rule should be in cases of this kind. They agreed upon the rule put forth by Hoffbauer, as above described, and accordingly it was announced authoritatively as the law of the land.

We may well be astonished that a rule which is to decide the question of life or death for all coming time, should evince the grossest ignorance of the mental operations when affected by disease, and should be put forth, too, by a body of men who might be supposed to be more correctly informed. The rule, be it observed, implies mental disorder, and consequent irresponsibility, the extent of which, however, is limited in an

arbitrary manner, with no reference at all to the pathological condition. It means that if a person imagine that enemies are waylaying him at every turn, he may not be accountable for that belief, because it has intruded itself into his mind without any will of his own; but that, it being there, he is accountable, to some extent at least, for what he thinks and does about it. He is required to act respecting it very much as if he were perfectly sane—killing his fancied enemy if he apprehends from him a murderous assault, as a matter of self-defence, but resorting to the courts for redress, if his enemy has only assailed his reputation, or is preventing him from obtaining certain estates. That there is any ground for such limitation, no one can admit who has been much conversant with the insane. Indeed, the fallacy of the principle in question is obvious enough without any experience of this kind. Everybody knows that the man who imagines that his legs have turned to glass, goes about as usual, instead of keeping still and thus making his conduct consistent with his belief.

How a principle so plainly and completely contradicted by the facts of science, should have obtained the currency that it has, is not easily explained. In England, this, as well as some other mistakes on this subject, may, possibly, be attributed to a famous dictum of Locke, who said that madmen reasoned correctly from false premises. Locke knew as little about insanity as the English law-judges, otherwise he would have known —what the humblest servant in a hospital for the insane knows—that the insane may wander at every step of their reasoning, from premises to conclusion. It is no more than might have been expected, that one who insanely believes that his neighbor has been telling bad stories about him, should also believe himself justified in taking that neighbor's life. The confusion of ideas, so flagrant and so common in discussions upon this subject, is well illustrated by the fact that the judge who presided at the trial of McNaughton, and who approved of his acquittal, subsequently joined the other judges in declaring Hoffbauer's rule to be the law of the land. Under this rule, McNaughton should have been convicted, for, crazy as he was, he certainly apprehended no personal harm from Sir Robert Peel. Another instance of this confusion of thought was exhibited by one from whose multifarious knowledge and keen sagacity something better might have been expected. Lord Brougham said in Parliament, on one occasion, that he could conceive of "a person whom Deity might not deem accountable, but who might be perfectly accountable to human laws." In other words, a mental disorder which would render a criminal act excusable in the eyes of God, might be entirely ignored in the judgments of men. In this statement Lord Brougham did not merely mean to declare—what nobody would deny—that man, with his limited apprehension, might fail to discern mental disturbances that would be perfectly obvious to the eye of Omniscience; he meant to assert the doctrine that a kind and degree of mental disorder, equally obvious to God and man, might lead one to excuse, and the other to punish, any criminal act that might be committed under its influence. How such a monstrous conclusion could be reached, except in defiance of all reason and religion, is not very obvious. We can account for it only on the supposition that, to the mind of the thorough-bred lawyer, it seemed imperative that the legal theory of guilt and responsibility should be upheld at all hazards. For certainly the act in question had in it all the elements of crime, and, of course, the doer of it must be punished, even though God undoubtedly were ready and willing to excuse him.

The other mistake pervading the theory of the law respecting the responsibility of the insane, is to leave out of the account altogether the moral faculties of our nature—the sentiments, passions, and emotions. Here again is another of those inconsistencies which abound in the current reasonings on this subject. While every one admits that in these faculties are the great springs of human conduct, that they incite men to good or to evil, and furnish the motives and impulses by which they are governed, the idea that they, or rather the cerebral organism with which they are connected, may become diseased as well as the reflective faculties, is regarded as preposterous and of dangerous tendency. And yet we have the same proof of the one fact that we have of the other. The conditions of health and disease are precisely the same in both. Both are manifested by the same material organ, the brain, by far the larger portion of which, according to the most prevalent opinion, is given to the moral powers. Disease in any part of the brain must necessarily be followed by derangement of its appropriate function, so that it is in the order of nature that when a certain part of the brain is diseased, there will be some disorder of the affectional faculties. How this conclusion can be denied by any one who believes that disease of the brain may produce loss of memory, of judgment, of attention, and of mental application, is not very obvious. The only possible explanation of this curious inconsistency is that disease of the moral faculties so often resembles manifestations of moral depravity, that it has been mistaken for the latter, especially by those who are not accustomed to regard this subject from a physiological point of view—their notions, as far as they imply any exercise of thought, being founded solely on metaphysical considerations.

And here we see the influence of that school of mental philosophy in which our predecessors were trained. We may safely say, I think, that had Herbert Spencer, and Bain, and Morell, lived and written in the days of John Locke, the popular notions respecting insanity would not now be precisely what they are. Under their teaching, the affectional faculties would have held their rightful place in the mental economy, and would have played as necessary a part in its operations as that of the others in completing the grand result implied in a thinking, social, responsible being. Until they are regarded in this way, we need not expect much improvement in the law of insanity. The tests of responsibility will continue to be what they now are—confined exclusively to the action of the reflective powers. The question will continue to be, did he know right from wrong?—did he know that the act was contrary to the laws of God and man?—did he evince forethought and contrivance in executing it?—ignoring the equally important questions, could he see the moral complexion of the act in its true colors?—had he the power, unaffected by disease, to pursue the right and avoid the wrong; to resist the natural impulses to wrong-doing by the superior force of conscience? Responsibility implies the integrity of *all* the mental powers, moral as well as intellectual. If the mental movement is disturbed by the intrusion of a foreign element, it is immaterial at what precise point this element enters. To suppose otherwise, is as absurd as it would be to suppose that a delicate piece of mechanism could be deranged only at a certain point.

As a consequence of this confusion of ideas, there has occurred a lack of uniformity in the practical application of the rules of law, which, considering the momentous issue involved, suggests no very comfortable reflections. The court may be satisfied of the irresponsibility of the

prisoner, while, under a strict construction of the rules, he must be regarded as guilty; or the jury may prefer to found their verdict on the matters of fact disclosed in the evidence, rather than on the rules of law laid down by the court. And such must always be the case as long as the matter of insanity is treated as a question of law rather than as a question of fact, for here is the source of much of the error that has been committed on this subject. It is especially visible in the current doctrine—as current now almost as it was in the time of Lord Hale—in regard to the exculpatory effect of what is called partial insanity. In some forms of disease, the patient does not seem to be entirely bereft of reason. On some subjects he converses with no lack of correctness or propriety; some business he transacts with his customary shrewdness; and many people meet him in the ordinary intercourse of life without suspecting any aberration of mind. It is not questioned that he still is, in some degree, a rational creature. And certainly it is not surprising that the world should be slow to admit such a mental condition as an absolute excuse for crime. If the person have been entirely rational for some purposes, or in some relations, why may not this circle of rationality have embraced the act for which he is tried? This is a fair question, undoubtedly, and is entitled to a respectful answer. What we complain of, is that, instead of being answered in the light of that knowledge of the workings of the insane mind which is derived from long, clinical observation of the disease, the question is supposed, in actual practice, to carry its answer with it. The logic runs thus: the act *may have been* the product of the reason left untouched by disease; therefore it *was*. We insist that the fact should be proved, and we claim in the interest of true science, as well as of humanity, that the burden of proof lies with the side that denies the influence of the alleged disability. The existence of insanity in never so small degree being shown, it is for the other side to show that it had no part nor lot in bringing about the criminal act. Now we do not deny that this is ever possible, but we do say that in most, if not all, cases, we are positively unable to fix the limits of the operation of disease, and to say that the act in question was not the offspring of disease. No man pretends to discern all the springs and turns of thought even in the rudest sane mind, and it certainly is no easier when the subject of observation is thrown out of its ordinary courses by a disturbing force. We know enough, however, on this subject, to be convinced that, very often, thoughts apparently the most remote and disconnected from one another, are found, on further research, to be closely associated, and thus to lead to conduct otherwise most strange and mysterious. He must have been a superficial or careless observer of insanity, who has not often discovered the most violent acts to be the outcome of a wild and tortuous succession of thoughts. To say that we see no logical connection between the mental condition as obviously manifested, and the criminal act, is simply a confession of ignorance, not a display of knowledge.

In contending that in criminal prosecutions, when insanity is pleaded in defence, the burden of proof should fall upon the side that resists it, we are only following the rule most used in civil cases. There, the existence of insanity having been shown, it is incumbent on the party wishing to establish the act in question, to prove that the person had recovered, or that the act was performed quite independently of, and was untainted by, disease. If a will be in dispute, and the testator be shown to have labored under some unquestionable delusion or weakness of mind,

the presumption is that the will is rendered invalid by the mental affection, and it is left for those who would establish it to prove the contrary, and the rule is the same in reference to contracts. It goes further even, for many a contract has been voided which displayed no indication of unsoundness, and which could not be traced to undue influence. There is not the slightest reason for this difference, in the nature of mental disease. Its agency in the occurrence of crime is as far beyond all our resources of detection, as it is in the making of a will or contract. If any difference is to be admitted, it should be the other way, inasmuch as an issue of life or death is a far more serious matter than one of property alone.

There is nothing in the popular conception of insanity so common or with so little foundation in the nature of things, as the idea that the extent of the malign influence exerted by insanity on the mind, can be accurately measured by the external appearance and deportment as viewed by the casual observer. It is supposed that a person who can converse sensibly, behave properly, and transact business, cannot be so insane as to be irresponsible for his criminal acts. In every trial where insanity is pleaded in defence, this idea is generally the main stay of the prosecution. A host of witnesses is summoned, who testify to perfect soundness of mind. One had frequently met the defendant, passed the time of day with him, and talked about the weather; another had employed him in some ordinary trust or duty; another had had some business-transactions with him, selling him, perhaps, some little necessaries of life, or paying him a trifle of debt or interest; another had met him mingling with company at a watering-place, or at some social gathering; and these persons, one and all, declare that they witnessed nothing strange or unnatural in his looks, discourse, or deportment; and those who had business-dealings with him, and especially if they got a good bargain out of him, declare him to have been uncommonly shrewd. This evidence, though entirely negative, is none the less effective with most of those who hear it. Its force is scarcely weakened by the statement, which they may admit in general terms, that insanity often leaves some operations of the mind untouched, and thus escapes the notice of the casual observer. And yet this trait of insanity would seem to be too common to be so disregarded in actual practice, for every hospital report, every newspaper that we take up, bears witness to its frequency.

In the normal condition, nothing, under ordinary circumstances, is dearer to a man than his life. To preserve it is one of the most powerful instincts of his nature, and, if in certain exigencies he willingly part with it, it is for the rational purpose of securing what seems to him a greater good, or of avoiding a present, real, unequivocal evil. And yet a large proportion of suicides are committed by persons urged by no apparent motives, in the possession of every outward circumstance calculated to make life desirable, and giving no indication whatever of mental disturbance. Up to the last moment, they may have transacted business, conversed sensibly with friends, and in all the relations of life conducted themselves with their customary propriety. Yet who will venture to say that, notwithstanding all these apparent indications of good mental health, suicide, committed under the circumstances just mentioned, does not signify a kind and degree of insanity as destructive of moral freedom and responsibility as the most demonstrative forms of the disease? It is also a well known fact that many of those persons who attempt unsuccessfully to commit suicide, while appearing to the casual observer

entirely sane, subsequently have only the most dim and uncertain consciousness of the attempt. Now, there is no reason to doubt that homicide, and perhaps some other criminal acts, may be committed in a similar state of mind—evincing just as much coolness, deliberation, and contrivance, and just as complete an absence of all the demonstrative signs of mental disease. It is not creditable to the intelligence of our time, that the apparent correctness and propriety of the person in the common relations of life, should be regarded as incompatible with the presence of insanity, or, at least, with any such insanity as should exempt him from responsibility.

Unquestionably, during the present century, the tendency of public sentiment, following, no doubt, that of the clinical study of mental diseases, has been to enlarge the exculpatory effects of the latter. Now and then there have been signs of reaction, never stronger, probably, than at this present moment. To men whose opinions are formed by the current prejudices around them, rather than by any careful study of facts, it seems as if the plea of insanity had been making crime a little too easy, and that a wholesome check to this facility would be found in punishing the insane like other criminals. The argument by which this doctrine is generally supported is that many of the insane know right from wrong, that they are governed by motives, and may restrain their passions. The facts implied in the argument, we willingly admit, for nobody denies that many of the actions of many of the insane are rationally considered and rationally performed. Nobody denies that their conduct may be determined by the hope of reward or the fear of harm. One patient strives hard to obtain a privilege or a favor, while another is deterred from an assault upon a fellow-patient by remembering the threshing he got in a former encounter. The same man who believes that he is coming to want, and destroys himself and family to save them from misery, may refrain, if he please, from exposing his person, from soiling his clothes or from assaulting his neighbor. Why then should he not be punished for offences that are not inspired by his disease? To those much conversant with the insane, the reasons against it are obvious and conclusive. The more that one learns of insanity, the more inscrutable are the movements of the mind affected by it, and the less confidence is felt in any attempt to discern exactly their connections, and to say which can be safely attributed to sanity and which to insanity. If this be so, under the daily and hourly observation of a skilful inquirer, what confidence can be placed in any positive conclusions founded on the testimony of those who have seen the accused at remote periods, who know nothing of insanity beyond what is learnt by the casual sight, now and then, of a person reputed to be crazy, and who are unable by lack of culture to convey to others the impressions thus made on their own minds. If any one could tell us—physician or philosopher, court, counsel, or jury—by what means, with the slightest approach to certainty, we might make the distinction between the working of the sane and that of the insane element, we would not object to the proposed rule. At any rate, let the burden of proof rest on the party which alleges that the criminal act was prompted not at all by the presence of disease.

There is another reason for not punishing the insane, which, feeble as it may be to the common mind, is conclusive to the close observer of mental disease. Admitting, as we do, that much of the daily life of the insane shows no trace of disease, we are none the less sure that the presence of disease, however limited it may appear, is generally incom-

patible with the most correct and vigorous exercise of all the faculties of the mind. It impairs the freedom of the will; it blunts the sense of right and wrong, of the good and true; it weakens the power of self-control, and diminishes the normal amount of restraint upon the appetites and passions. No one engaged in the service of a hospital can have failed to observe how fiercely the passions of the patients are excited by little provocations that would scarcely have ruffled their tempers before; how disproportioned to the offence is the measure of their retaliation; how grossly exaggerated are every feeling and impulse awakened by the ordinary experiences of life; how often native propriety of manner and delicacy of sentiment are replaced by a rude demeanor, and by a coarse, reckless disregard of the rights and feelings of others. Even when the criminal act seems most clearly beyond the range of the morbid influence, there is always reason to suspect, if not to positively believe, that it would not have been committed except for this enfeeblement of the power of self-control, or this blunting of the moral perceptions.

Such being the fact, it shows how groundless is the doctrine, somewhat countenanced just now, of a limited responsibility, as applied to the partially insane, according to which they are always to be punished for their criminal acts, though in a less degree than they would be if unquestionably sane. I need only allude to the doctrine, as its unsoundness has been sufficiently shown by the views already expressed. A moment's reflection must convince any one that no device of legislation could make the application of it in practice otherwise than absurd. The idea of a court or jury constructing a scale of insanity according to its severity, and graduating the measure of punishment thereby, is simply ridiculous, and would be rendered still more so by any attempt to apply it to a given case.

Recently, we have seen the revival of a doctrine, never much in vogue, however, that the insane should be punished in order to deter them, by force of example, from breaking the laws. In support of this view, instances are related of insane persons, who, when talking over the criminal acts of others understood to be insane, have said to each other with much self-complacency, that, being insane, they would not be punished. In this belief, they would naturally use no self-control, and would feel free to break every law on the statute-book. Unquestionably the insane know very well that they may not be punished for their offences, as they know a great many other things. They are able to reason correctly on the subject, as they do on many other subjects. The fact is not extraordinary, nor has it recently come to light, and, considered in connection with other facts, it implies no responsibility. The truth is, that very few of the insane believe that they are insane; consequently, immunity from punishment does not present itself to them as an inducement to commit crime, nor to relax in the slightest degree their control over their passions. While they perceive well enough the abstract nature of crime, they cannot see it as applied to any particular act in their own cases. They are outside of the range of such application, and are a law to themselves. Some are urged by a necessity which they cannot resist, even knowing that they do wrong, and knowing the usual consequences. Some are prompted by strange suggestions: the voice of an unearthly presence, a terror that overrides every thought of consequences, or a spur of savage ferocity unmingled with the slightest sense of humanity. These people act without reference to law or gospel, under motives and impulses as remote from their natural dispositions and principles as the

poles are asunder. The fact that persons reputed to be insane had suffered the usual penalty for their crimes, would have no more restraining influence than blows or threats in hushing the cries of a new-born infant. No human law can be more imperative than that higher law within him which impels many an insane man to some act of violence, and no consideration of justice or pity can come in to lighten the stroke provoked by the trivial offence of a neighbor. Indeed, this idea of the insane being deterred from criminal conduct by penal laws, is utterly destitute of foundation, and we challenge its advocates to produce a single instance in point.

In order to make this idea practically efficient as a means of restraint, some steps would be required to give it an authoritative character, for unless the insane were somehow convinced of their responsibility, clearly and fully, of course it could have no restraining power. There would seem to be an insuperable difficulty in the way of making this idea immediately effective. If left to the courts, the most that could be expected would be now and then a decision declaring insanity to be no excuse for criminal acts. And supposing these occasions to become more and more frequent, until the rule should generally prevail, there still would be a considerable period of doubt and uncertainty as to the actual state of the law. The case could be properly met, if at all, only by an act of the legislature, and, in the present state of public sentiment, nothing is less likely to happen than an act making insanity, of whatever kind or degree, no excuse for crime. If, however, the legislature, without going to this extent, should undertake to specify what forms of the disease should or should not have this effect, as it has in some European countries, the result would be a lamentable failure, producing only confusion and distrust. Our notions of the actual limits within which the operation of any form of insanity is confined, are too vague for such a purpose, and the imperfection of our nomenclature would prevent any approach to uniformity of meaning. And thus we stand: The legislature is indisposed to act, and the rules adopted by the courts are irrelevant, inadequate, and conflicting. Nor from this unsatisfactory condition of the law can we expect any relief, until the whole question of insanity shall be regarded as a question of fact, not of law, as at present; and, thus regarded, shall be taken altogether from the court, and, like other matters of fact, be given to the jury, which would be governed by the weight of evidence and the individual convictions of the jurors. This course is virtually taken by juries, even now, and it is held up as a flagrant instance of our scandalous indulgence of crime, that many a verdict of "not guilty, by reason of insanity," is rendered, in spite of the instructions of the court.

I cannot leave the subject without adverting to an argument in favor of punishing the insane like others, on which unusual stress has been laid in some recent trials. It is represented that in our hospitals for the insane, the discipline is maintained by the use of rewards and punishments. This implies that the patients are deterred from wrong-doing by the understanding that it will be followed by punishment, and the inference is drawn that the same motive would operate in the same way outside, as well as inside, of a hospital. If the statement on which this reasoning is founded were strictly true, it should be taken in connection with the other well-known fact, that many of the insane are not deterred from violence or any other wrong by fear of any consequences whatever. Neither threats nor blows, nor death itself, can turn them from their chosen

course. And thus arises the difficulty which has already presented itself in another shape, that of determining to which of these two classes the accused may belong. By what kind of evidence are we to be convinced that the prisoner at the bar would have refrained from committing the offence for which he is on trial, had he believed that he would be punished?

But we are really not reduced to this dilemma. The idea that the inmates of our hospitals are punished for their delinquencies, is false—entirely without foundation in fact. They are deprived of a privilege or of an indulgence, which they have shown themselves unable to use without harm to themselves or others—an inability which may have been as much beyond their control as the usual manifestations of bodily suffering. Such deprivations, as well as rewards for good behavior, are used as a means of trying and strengthening the power of self-control—a power which in the insane is confessedly weak. Its exact degree of weakness or strength, no one much acquainted with them will undertake to measure; and who then can measure it for the purpose of apportioning the proper amount of judicial punishment? So far is it from being true that the patients in our hospitals are punished for any reason whatever, that the attendants are prohibited from returning a blow, or retaliating for insults or injuries, on pain of dismissal; and yet, when provoked by serious assaults, they might often say with truth, "he knew better; he knew he was doing wrong; and a little summary punishment will help to make him do better in the future." But if to punish the insane be good law in a court of justice, why should it not be in a hospital? We would have it distinctly understood that it is not good law in the latter, not because there is never a case in which punishment might prove a powerful help to improvement, but because no insight short of Omniscience can ever know for certain which are such cases. It may be urged, perhaps, that exception should be made of cases in which it is shown by satisfactory evidence that the accused had often been deterred from wrong-doing by the fear of punishment. The statement is quite too vague to serve as the ground of a general rule; and besides, it is open to the objection of showing a negative rather than a positive state of facts. What a man refrains from doing under certain circumstances, is no safe measure of the extent of his self-control under other and very different circumstances.

That there has been, of late years, much practical disregard of the rules of law, on the part of juries, must be admitted; but the course of judicial decisions and verdicts within a very recent period, shows how grievously potent they still are. About two years ago, one Fordham, a patient in an asylum for the insane, murdered an attendant. It appeared in evidence that he was an epileptic, quarrelsome, and often violent; that he had quarrelled with the attendant, and had declared that he would have revenge. He was tried, and convicted of murder. The court, Mr. Justice Denman, charged the jury that the mere fact that the prisoner was laboring under a delusion as to his treatment in the asylum, as no doubt he was, was not sufficient excuse in law. "If a man killed another," said he, "while under a delusion that he himself was about to be killed, and that he was acting in self-defence, he would not be punishable; but if a man did so for some supposed injury to his character or fortune, then he would be responsible." Sentence of death was passed in the usual form, but the punishment was afterwards commuted to penal servitude for life. Some three or four years ago, Mr. Lutwidge, one of the members of the

Board of Lunacy, while passing through a hospital which he was visiting officially, was assaulted by a patient, who inflicted upon him a wound from which he soon died. The patient's insanity was unquestioned, though he had not been supposed to be dangerous. In speaking of the case, in their annual report, the twenty-eighth, the Board say that the man "was quite responsible for his actions." Since this case occurred a man named Blamfield has been tried for murdering a fellow workman. The act was done suddenly, without apparent premeditation or provocation. Blamfield had been a patient in a lunatic asylum, from which he had been discharged, uncured, some months before. The medical superintendent of the hospital testified that, while in his charge, Blamfield had had a fear of punishment for misconduct, and had been governed by this feeling. He, therefore, considered him responsible for his acts. The man was convicted of murder, and sentenced to be hanged; but his punishment was subsequently commuted.

Such are the more prominent difficulties now in the way of making the plea of insanity in criminal cases as effective as it should be. The question may naturally be asked: How can these difficulties be most readily removed, and the law be administered in conformity with the truths of science? It is scarcely within my purpose to speak upon this point, but it may not come amiss to indicate very generally the direction from which reform may come.

Let me say, in the first place, that if courts are to continue to measure the exculpatory effects of insanity by certain arbitrary tests, they are bound to avail themselves, as did Lord Hale, of all the existing medical knowledge on this subject. Instead of repeating, one after another, rules and distinctions, of which the sole claims to respect consist in the fact of their having been uttered before, it is their duty to learn as much as possible of the nature of insanity from the only true source of knowledge —the practical observation of the insane. Legal knowledge is, for the most part, so technical that the decisions of the courts on most matters are received by the public in faith, nothing doubting; but on this subject, the public will have an opinion of its own. The people who would shrink from the presumption of understanding a question of contingent remainders, or of eminent domain, may have little respect for any rule of law touching the responsibility of the insane. Have we not a right to ask the judges to make themselves acquainted with the nature of insanity by all the means within their reach, so that, instead of directing the jury by a servile repetition of something that others have said before them, with no other authority than the fact that it *has been* said, they shall present only the established facts of science, and such considerations as are naturally suggested by them? Let it be remembered that we are dealing with a branch of medical jurisprudence, and, therefore, that the study here recommended belongs as well to the lawyer as to the physician. I do not suppose, indeed, that the soundest instructions would always be followed by a proper verdict, for juries are too fond of manifesting their independence by disregarding whatever may conflict with their own foregone conclusions. But it would remove somewhat the distrust now felt of judicial decisions, in which the advancement of knowledge is entirely ignored, and would prepare the way for a better and more satisfactory administration of justice.

A still better step, as above intimated, would be that already taken by the courts of New Hampshire, whereby the question of responsibility

is treated as a matter of fact, not of law, to be determined, like other matters of fact, by the jury. In the performance of this duty, juries would be governed by the evidence, aided by the explanations of the experts. This would not necessarily insure a correct verdict; for the evidence might be conflicting, the experts might disagree, and the jury might be governed more by its prejudices than by the real merits of the case. It is doubtful, however, if anything better could be obtained under our mode of procedure, and this is not likely to be changed at present. Some improvement might follow from putting into the jury-box men of higher personal character, moral and intellectual, than such as are often found there. This improvement could be more easily made, I am sorry to say, than could one equally if not more efficient, whereby the experts should prepare themselves more carefully for their duty, and should discharge it, divested of every unworthy bias.